

Appeal from separate decisions of the Jarbidge Resource Area Manager, Bureau of Land Management, rejecting application for desert land entry IDI-18290 and denying renewal of land use permit IDI-24401.

Decision rejecting application for desert land entry IDI-18290 affirmed; decision denying renewal of land use permit IDI-24401 set aside and remanded.

1. Desert Land Entry: Applications

The mere filing of a desert land entry application does not create any present right or interest in the land in the applicant, but only the right to have the application considered.

2. Desert Land Entry: Applications

A desert land entry application must be accompanied by a petition for classification, unless the lands have already been classified and opened for disposition under the desert land entry laws. Such a classification is a prerequisite to allowance of an entry.

3. Desert Land Entry: Applications

The law governing desert land entries provides only for the assignment of entries, not applications.

4. Desert Land Entry: Applications--Desert Land Entry: Cultivation and Reclamation--Desert Land Entry: Lands Subject To

When, at the time of filing a desert land entry application, one-eighth of the desired land is being farmed through the use of irrigation, the land is considered effectively reclaimed and not subject to desert land entry.

5. Bureau of Land Management--Public Lands: Special Use Permits--Rules of Practice: Appeals: Generally--Special Use Permits

The regulations governing special land use permits, 43 CFR Part 2920, do not provide for an intermediate appeal from a decision by the Area Manager to any other BLM officer. A decision by a BLM Area Manager refusing to renew a land use permit is subject to immediate appeal by the permittee to the Board of Land Appeals under 43 CFR 4.410(a).

APPEARANCES: Carl S. Hansen, Buhl, Idaho, pro se; Robert S. Burr, Esq., Office of the Field Solicitor, U.S. Department of the Interior, Boise, Idaho, for the Bureau of Land Management.

OPINION BY DEPUTY CHIEF ADMINISTRATIVE JUDGE HARRIS

Carl S. Hansen has appealed from two decisions of the Jarbidge Area Manager, Bureau of Land Management (BLM). The first, dated March 12, 1992, refused to renew land use permit IDI-24401. Under a series of land use permits, the most recent of which was IDI-24401, Hansen had been farming 18.2 acres of public land in the E $\frac{1}{2}$  NE $\frac{1}{4}$  of sec. 28, T. 8 S., R. 13 E., Boise Meridian, Twin Falls County, Idaho, for a period of approximately 11 years. The second decision, dated March 26, 1992, rejected desert land entry (DLE) application I-18290 filed by Hansen on January 15, 1982, seeking conveyance under section 1 of the Desert Land Act of March 3, 1877, as amended, 43 U.S.C. § 321 (1988), of 80 acres of public land described as the E $\frac{1}{2}$  NE $\frac{1}{4}$ , sec. 28, including the lands within the land use permit.

The case record and pleadings provide the following history regarding the E $\frac{1}{2}$  NE $\frac{1}{4}$  sec. 28. Appellant's father, Warren Hansen, filed a DLE application (I-9437) for those 80 acres on April 30, 1975. At that time, a circular pivot irrigation system installed on his farm crossed over onto the land at issue. In 1977, while Warren Hansen's application was pending with BLM, appellant took over the farming operation and thereafter began farming the public land crossed by the circular pivot. In 1980, BLM cited appellant for trespass for those activities and he paid trespass damages.

In a decision dated August 20, 1981, BLM held Warren Hansen's DLE application for rejection, explaining that it had learned that he was a resident of Garland, Utah, and that under 43 U.S.C. § 325 (1988), except in the State of Nevada, only a resident citizen of the state in which the land sought is located can make a DLE. BLM provided Warren Hansen 30 days within which to provide evidence that he was a resident citizen of the State of Idaho, or, in the alternative, relinquish his DLE application. BLM informed him that failure to respond would result in rejection of his application. On September 17, 1981, Warren Hansen filed a relinquishment of his application with BLM.

On January 15, 1982, appellant filed his application I-18290 for the same land. The record indicates that at the time appellant filed his DLE

application he was authorized to conduct farming operations on public lands in the E½ NE¼ sec. 28 under BLM permit ID-1-TP-1-75, which stated that it was issued for the purpose of "cultivating 28.21 acres of public land and permit the fence that bounds the land on the west side." <sup>1/</sup> Thereafter, through various renewals of the permit, BLM continued to authorize appellant's use until February 28, 1992.

In a decision dated March 12, 1992, the Jarbidge Resource Area Manager, BLM, refused to renew appellant's permit to farm, giving two reasons. First, he stated that "[s]ince the permit has now expired and an application to extend this use has not been requested, we no longer wish to make provisions for this farming activity in the future." Second, he pointed out that appellant had 24.1 acres of private farm land in the Soil Conservation Service's Conservation Reserve Program (CRP), and that it was "Bureau of Land Management policy not to allow farming and otherwise agricultural development on public lands while participating in programs of other Federal agencies to reduce crop production on ones private land."

On March 26, 1992, the Jarbidge Resource Area Manager, BLM, rejected appellant's DLE application I-18290 on the basis that the lands sought had been effectively reclaimed and were therefore not subject to DLE, citing 43 CFR 2520.0-8(a)(3) and Nathan F. Gardiner, 114 IBLA 380 (1990). He stated that more than one-eighth of the land sought under the application had been cultivated for a number of years through the use of a circular pivot system. <sup>2/</sup>

Appellant filed a timely notice of appeal on April 1, 1992, challenging both those decisions and including therein reasons for the appeal. He subsequently filed additional statements, dated April 21, 1992, and February 12, 1993, and April 20, 1994.

On May 23, 1994, this Board issued an order completing service of appellant's statements dated February 12, 1993, and April 20, 1994, because there was no evidence that appellant had served counsel for BLM with a copy of those documents, as required by 43 CFR 4.22(b). In addition, by the same

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<sup>1/</sup> In a supplemental statement of reasons dated Apr. 21, 1992, appellant explained:

"In 1980, when I was cited for trespass, I was told that 28.2 acres were being farmed. I then paid rent on that 28.2 acres. In 1986 the Twin Falls ASCS office said that it was only about 18 acres. We had it remeasured and it was 18.2 acres. BLM owed m[e] a refund for those years I had been paying the extra rent. It was decided to use this overpayment for future rent. In 1989 the last 2 year lease agreement was signed and in 1990 the last of the extra rent money was used. Then in 1992 when the lease expired, a renewal was rejected."

<sup>2/</sup> The Area Manager further stated that because a quarter quarter section is the smallest legal subdivision for the classification and disposal of land and portions of each quarter quarter section had been farmed and were not desert in character, the remaining unfarmed acreage was unsuitable for disposal because it constituted less than a quarter quarter section.

order we served appellant with various documents in the file that had been placed there by BLM after the filing of his notice of appeal, but for which there was no evidence of service. BLM and appellant were granted 30 days from the receipt of our order in which to file any desired responses. Neither filed a response.

We will first address BLM's rejection of the DLE application. On appeal, appellant claims that his 1982 application "was only a transfer of the original DLE application from my father, Warren E. Hansen, to my name because I had purchased the farm from him" (Apr. 21, 1992, Statement). Appellant claims that he had a conversation with a BLM employee who assured him that his application would maintain his father's priority date.

The thrust of appellant's argument is that his application, rather than a new application for the land, was actually an assignment or transfer from his father and that he should maintain his father's filing date for priority, which was at a time when the land had not been reclaimed.

[1, 2] The first step in complying with the procedures required for securing title to public land under the Desert Land Act is the filing of an application for entry. However, the mere filing of an application does not create any present right or interest in the land in the applicant, but only the right to have the application considered. In addition, the application must be accompanied by a petition for classification, unless the lands have already been classified and opened for disposition under the DLE laws. 43 CFR 2521.2(a). <sup>3/</sup> The case record for Warren Hansen's DLE application I-9437 shows that his application was accompanied by a petition. No petition appears in appellant's file. Most importantly, however, there is no evidence that the lands in question were ever classified for disposition under the DLE laws. <sup>4/</sup> Such a classification is a prerequisite to allowance of an entry. See Duella M. Adams, 70 IBLA 63 (1983); Rulon Van Tassel, 33 IBLA 221 (1977).

[3] Thus, it is clear that Warren Hansen's application for entry could not have been allowed, even if he had been a resident citizen of the State of Idaho. Accordingly, there was nothing to assign or transfer to appellant because the law governing desert land entries provides only for the assignment of entries, not applications. 43 U.S.C. § 324 (1988); 43 CFR 2521.3. Moreover, even assuming an assignment or transfer of the application were

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<sup>3/</sup> A DLE for unclassified land which is not accompanied by a petition for classification gains no priority until the deficiency is cured. Thomas D. Nighswonger, 6 IBLA 341, 342 (1972).

<sup>4/</sup> In a letter dated Jan. 18, 1982, acknowledging receipt of appellant's application, BLM stated that it would "examine the lands you have applied for and determine whether they can be classified for the purpose desired."

It also stated that it would "subsequently issue a classification decision in accordance with the regulations, 43 CFR 2450.3, and you will be sent a copy of this decision." BLM made such statements, even though, as far as the case record forwarded to the Board shows, no petition accompanied appellant's application. Nor does the record contain any classification decision.

possible, Warren Hansen would have had to make such a transfer or assignment prior to his relinquishment in September 1981. The record contains no evidence to support such an assignment or transfer, other than appellant's assertion that a BLM employee assured him that he could maintain his father's filing date.

The fact that appellant may have received some erroneous advice from a BLM employee does not support his claim. It is well settled that the United States is not bound by the acts of its employees when they "cause to be done what the law does not sanction or permit." 43 CFR 1810.3(b). Further, reliance upon information or opinion of a BLM employee "cannot operate to vest any right not authorized by law." 43 CFR 1810.3(c); Jack J. Grynberg, 114 IBLA 225, 229 (1990).

[4] At the time appellant filed his DLE application in January 1982, he had been cited for trespass for farming part of the lands in question. In an apparent attempt to legitimize that trespass and allow appellant to continue farming, BLM issued him a land use permit. However, by farming the land, appellant removed it from consideration as land available for disposal under the DLE laws. The DLE regulations specifically provide that "[l]and that has been effectively reclaimed is not subject to desert land entry." 43 CFR 2520.0-8(a)(3). The reason for this regulation is clear, since by statute (43 U.S.C. § 321 (1988)), DLE's are limited to desert land, and lands which have been reclaimed to the point that they are no longer in a desert state are not subject to entry. Nathan F. Gardiner, 114 IBLA at 382. The determination of the desert character of the lands sought must be made as of the date of filing of the application. Id. at 381. Lands are considered effectively reclaimed where a sufficient quantity of water has been brought on the land so as to render it available for irrigation of the land and one-eighth of the land has been cultivated. Id. at 385. The record shows the existence of those factors at the time appellant filed his application in January 1982.

Accordingly, for all these reasons, we find that BLM properly denied appellant's DLE application.

We turn now to BLM's March 12, 1992, decision denying renewal of appellant's land use permit IDI-24401. In his notice of appeal filed on April 1, 1992, appellant challenged that decision and provided reasons in support of his appeal thereof. However, in a statement dated April 21, 1992, he explained:

I am amending the appeal dated March 30, 1992, to include additional information and to remove the appeal on the rejected renewable Land lease. I have been informed by the local BLM office that I have no rights on a rejection of a renewable land lease agreement.

The record contains a memorandum to the file dated April 7, 1992, from the BLM Area Realty Specialist, following a meeting with appellant on April 1, 1992. Therein, he states:

Upon reading through the appeal Mr. Hansen submitted, it was obvious that he was confused because he had appealed both the decisions denying the Land Use Permit and the DLE. We explained that the DLE was appealable, as stated in the decision letter to the Interior Board of Land Appeals (IBLA) but the permit was not. We explained that he could protest that decision which would go to the District Manager for reconsideration. We suggested to him that he should separate the two and that we would hold this file here until we received his revised appeal. He said that would be fine and he would prepare a revised appeal. We explained this to him at our March 26, 1992, meeting but he must not have completely understood this process.

We refuse to accept appellant's attempted withdrawal of his appeal of BLM's March 12, 1992, decision, because that withdrawal was premised on erroneous advice from BLM. BLM advised appellant that he could not appeal the decision not to renew his land use permit, but that he could "protest that decision which would go to the District Manager for reconsideration."

[5] A decision by a BLM official which does not fall within any of the exceptions enumerated in 43 CFR 4.410(a) or is excepted from review by other duly promulgated regulations is subject to appeal to the Board of Land Appeals, and a BLM official is without authority to state otherwise. Southern Utah Wilderness Alliance, 114 IBLA 326, 329 (1990).

The land use permit in question is authorized pursuant to section 302 of the Federal Land Policy and Management Act of 1976, 43 U.S.C. § 1732 (1988), and regulations found at 43 CFR Part 2920. BLM's decision not to renew the permit does not fall within any of the exceptions to the Board's jurisdiction set forth in 43 CFR 4.410(a). Nor is there any exception in 43 CFR Part 2920 to the Board's jurisdiction. Thus, the appeal advice that BLM provided appellant regarding its March 12, 1992, decision was clearly erroneous. It should have informed him that he had a right to file an immediate, direct appeal of the March 12 decision to this Board. See Patrick Blumm, 121 IBLA 169, 170 (1991).

Review of the March 12, 1992, decision is hampered by the fact that no record exists to support BLM's refusal to renew appellant's permit, other than the decision itself. <sup>5/</sup> The decision stated that because the permit had expired on February 28, 1992, and no application to extend the use had been made, BLM no longer wanted to authorize the activity. However, the record shows that upon expiration of appellant's land use permit on February 28, 1986, BLM accepted a renewal application on March 17, 1986, and on July 11, 1986, issued a permit for the period March 1, 1986, through February 28, 1989. Thus, the failure to file a timely application to renew was not previously considered by BLM to be a bar to renewal.

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<sup>5/</sup> The case file forwarded to the Board by BLM did not include that decision. However, a copy of that decision was included in various record documents which appellant submitted to his congressman and which were routed to this Board.

The other ground for refusing to renew was BLM's policy against authorizing agricultural development of public lands to someone participating in the CRP program. In his notice of appeal, appellant explains that he had some pivot corners on his private lands in the CRP program, but claims that he was unaware that participation in the CRP program was a problem. He states: "I did offer to drop out of the CRP program, but this was rejected."

While BLM's policy sounds reasonable, there is no copy of any such written policy in the case record to support such action. In addition, appellant claims to have been unaware of the policy, and also asserts that he attempted to get out of that program but was refused.

As we have previously held, where BLM issues a decision, it must ensure that the decision is supported by a rational basis and that such basis is stated in the decision, as well as being demonstrated in the administrative record accompanying the decision. Burnett Oil Co., 122 IBLA 330, 332 (1992). As a general rule, an administrative decision is properly set aside and remanded if it is not supported by a case record providing this Board the information necessary for an objective, independent review of the basis for the decision. Fred D. Zerfoss, 81 IBLA 14 (1984). Herein, there is no basis in the record for BLM's decision not to renew appellant's permit.

Accordingly, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, BLM's decision rejecting DLE application IDI-18290 is affirmed and BLM's decision denying renewal of land use permit IDI-24401 is set aside and remanded.

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Bruce R. Harris  
Deputy Chief Administrative Judge

I concur:

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Franklin D. Arness  
Administrative Judge